CASES

ARGUED AND DETERMINED

IN

THE SUPREME COURT

OF

THE STATE OF MISSOURI.

FEBRUARY TERM, 1874, AT ST. JOSEPH.

(CONTINUED FROM VOL. LV.)

STATE OF MISSOURI, *ex rel.* ELLZEY VAN BUSKIRK, Appellant, *vs.* ALBERT BOECKER, Respondent.

1. *County Clerk—Resignation of office—Filing of with County Court—Effect—Forwarding of paper to Governor—Action by, etc.*—The Clerk of a County Court tendered his resignation to take effect at a future date. The paper was filed in the office of the court. Afterward and before the date when the resignation was to take effect, the clerk forwarded to the County Court his written withdrawal. But meantime and without his consent and against his express directions, the resignation had been forwarded to the Governor and by him approved, and another person appointed clerk.

Held, that under a proper construction of the State Constitution (Art. V, § 8), such resignation was not legal and complete unless sent to the Governor and accepted by him with the knowledge and consent of the clerk; that the filing of the document with the County Court was a nullity, giving that body no jurisdiction; that the paper was constructively still in possession of the clerk; that in law the office of County Clerk did not become vacant; and that with the sanction of the court, the clerk might at the same term legally withdraw his resignation notwithstanding the new appointment of the Governor.

Appeal from Holt Circuit Court.

Heren, Collins and Bennett Pike, for Appellant.

I. When respondent notified the County Court in writing that he resigned the said office, to take effect at a future time, he expressed his intention by an unequivocal act and was in every way bound by it. It was not necessary that the resignation should be made to the governor in order to make it complete, for an office may be resigned without a formal act.

Any conduct actually inconsistent with the retention of the office and a formal acceptance of the resignation or appointment of another by proper authority, is sufficient to constitute a resignation. (People, *ex rel.* McCune vs. Board, etc., 26 Barb., 487.)

II. A person resigning an office and manifesting the resignation by an unequivocal act, though he may retract or withdraw before the same has been accepted or any act has been done to fill the place thus made vacant, cannot do so after the resignation is accepted or the appointment of another to fill the place is made. (People, *ex rel.* McCune vs. Board, *supra;* Biddle vs. Willard, 10 Ind., 62).

III. A resignation to take effect in the future creates a vacancy in the meaning of the law, and the office can be filled by appointment to take effect at some future time. (People, *ex rel.* Livingston vs. Albany, C. P., 19 Wend., 27.)

T. H. Parrish, for Respondent.

I. Relator's resignation was to take effect Dec. 31, 1872. Till then there was no vacancy; yet relator claims by virtue of an appointment made three months before. Such appointment was void. (Biddle vs. Willard, 10 Ind., 62; Nooe vs. Bradley, 3 Blackf., 158.) The vacancy must have actually existed. (State Const., Art. V, § 8; see also Gen. Stat. 1865, p. 226, § 4; State, *ex rel.* vs. Baird, 47 Mo., 302; Stockton vs. State, 7 Ind., 326; State vs. Boone County Court, 50 Mo., 377.)

Had respondent sent his resignation to the Governor, he

might have withdrawn it before its acceptance and before Dec. 31st, and afterward by the Governor's consent, had no new rights intervened. (Biddle vs. Willard, & People, *ex rel.* McCune vs. Board, etc., 26 Barb., 487.) Here respondent never delivered his resignation to the Governor, but the act was done by relator in person, contrary to respondent's express orders.

Chandler & Sherman, for Respondent.

I. The tender of a resignation to any other than the authority competent to accept it—in this case the Governor—is nugatory. (State, &c. vs. Brown, 22 Ohio St., 615).

II. To constitute a resignation, there must be an intention to relinquish a portion of the term of an office, *accompanied* by the act of relinquishment. (Biddle vs. Willard, 10 Ind., 62.)

III. A tender of a resignation to take effect at a future day, amounts but to a notice of intention or a proposition to resign, and the officer still retaining possession of the office, may recall his resignation. (Biddle vs. Willard, *supra.*)

IV. Relator's appointment before Dec. 31st, was a nullity. Till then there was no vacancy. (State, *ex rel.* vs. Baird, 47 Mo., 302; Moore vs. Bradley, 3 Blackf. 158).

WAGNER, Judge, delivered the opinion of the court.

The following facts appear from the record: The defendant was at the general election in 1870 elected to the office of Clerk of the County Court of Holt County for the term of four years. He qualified and took possession of the office and by virtue of said election is still in possession, performing the duties of the office. On the 9th day of August, 1872, he addressed a note to the County Court, tendering his resignation, to take effect on the 31st of December, 1872. On the same day the court received the letter of resignation, and ordered an acceptance to be entered upon its records. The court then adjourned to meet on the 15th day of September, 1872. On the 9th day of September the defendant told Van Buskirk,

who now claims the office, that he intended to withdraw his resignation and hold on to the office, if the County Court would permit him to do so, and on the same day filed his withdrawal in the County Clerk's office. On the 13th day of September, Van Buskirk, with the consent of defendant, procured from the Deputy County Clerk certified copies of the above mentioned resignation and order of the County Court, and on the succeeding day, the 14th of the same month, he presented the same to the Governor, who thereupon indorsed his acceptance upon the resignation paper, and directed a commission to be issued by the Secretary of State to Van Buskirk for the office, to take effect on the 31st day of December, 1872.

It is not pretended by Van Buskirk, nor did he inform the Governor, that the defendant authorized him to present the resignation to the Governor, or even consented that he should do so; but he informed the Governor how and for what purpose he obtained the certified copies, and that the defendant intended to withdraw his resignation, and retain the office if the County Court would permit him to do so. With a full knowledge of these facts, the Governor commissioned Van Buskirk, and on the 16th day of September, 1872, he exhibited his commission to the defendant and the County Court, at which time the court made an order authorizing and permitting defendant to withdraw his resignation and rescinding the former order accepting it. On the 31st day of December next thereafter, Van Buskirk, having gone through the formality of giving bond and qualifying, demanded possession of the office, which the defendant refused to surrender, and a *quo warranto* was sued out to test the validity of the appointment. Upon these facts the Circuit Court rendered a judgment for the defendant.

The question is: When does a vacancy occur which will authorize its being filled by appointment? The Constitution of this State provides that "When any office shall become vacant, the Governor, unless otherwise provided by law, shall appoint a person to fill such vacancy." (Const. of Mo., Art. 5, § 8.)

Since this section in the Constitution was adopted, the legislature has entirely failed to take any action on the subject, and there is no statutory provision in reference thereto so far as the County Clerkship is concerned. The whole power of appointment, then, is vested in the Governor, and it does not appear that any other person or tribunal has anything to do with or control over the subject. In the case of the State, *ex rel.* Henderson vs. The Boone County Court (50 Mo., 317) it was said that an existing office without an incumbent is vacant within the meaning of the Constitution, and can be filled by the Governor by appointment, unless an election or some other mode is plainly indicated. For this position, the court cites with approval the case of Stockton vs. The State (7 Ind., 326), where the same language is used. In this latter case the judge who wrote the opinion of the court, in defining what a vacancy is, and when it happens, says: "There is no technical nor peculiar meaning to the word "vacant," as used in the Constitution. It means empty, unoccupied, as applied to an office without an incumbent. * * * An existing office without an incumbent is vacant, whether it be a new or an old one."

In Biddle vs. Willard (10 Ind., 62), it was held that to constitute a complete and operative resignation, there must be an intention to relinquish a portion of the term of an office, accompanied by the act of relinquishment. "Hence," says the court, a "prospective resignation may in point of law, amount but to notice of an intention to resign at a future day or a proposition to so resign, and for the reason that it is not accompanied by a giving up of the office, possession is still retained and may not necessarily be surrendered till the expiration of the legal term of the office, because the officer may recall his resignation; may withdraw his proposition to resign. He certainly can do this at any time before it is accepted, and after it is accepted he may make the withdrawal by the consent of the authority accepting where no new rights have intervened."

As by the terms of the law, the Governor alone has the authority to make the appointment in case of a vacancy, it would seem to follow, that in order to make the resignation operative,

it should be addressed to him. This is unquestionably the general principle, that when power is bestowed upon a particular officer, when a vacancy occurs, to fill the same by appointment, that the resignation should be sent to him that he may accept it, and then proceed to the discharge of his functions in the premises. The County Court had no jurisdiction over the matter whatever. There is no authority empowering it to take any steps or authority in the case. The resignation placed on file in the records of the court, was a paper not legally or rightfully there, and had no more effect than if it had been retained in the possession of the defendant. The acceptance of the County Court was a nullity, for no provision of law gave it any authority to make such acceptance. But even conceding that the paper which the defendant addressed to the court was evidence of his intention to resign, and was effective as a resignation at a future day, still it was competent for him to withdraw it with the sanction of the court. Both orders were made at the same term of the court, and the court may rescind any prior order made during the term. The notice of withdrawal was made five days before the papers were presented to the Governor, and Van Buskirk, the claimant, was personally notified of the fact, and the Governor was fully advised of all these circumstances before he proceeded to make the appointment. The resignation, which was not made to the Governor, but to the County Court which had no authority in the premises, was presented to the executive against the defendant's express wishes, and without his authority, and the appointment was then made, fifty days before any actual vacancy could take place. The resignation was really in the keeping and under the control of the defendant. It could not amount to a complete and legal resignation, either present or prospective, until it was actually delivered to the Governor and accepted by him, with the knowledge and consent of the defendant. The delivery was not only without his consent, but against his express wishes and protest. Under such circumstances the appointment was simply an attempt to deprive the defendant of an office to which he had been legally

elected by the people, against his will, and without the authority of law. Van Buskirk acquired his claim with full knowledge of all the facts, and he has no rights for a court to enforce or protect.

I think the judgment below was right and should be affirmed. The other judges concur.

GEORGE W. STEPHENS, Respondent, *vs.* ANDREW J. BROWN, Appellant.

1. *Landlord and tenant—Lessee holding over—Notice to quit, when not necessary.*—A lessee for a year, holding over, but disclaiming his landlord's title, is not entitled to notice to quit.
2. *Practice, civil—Motion for a new trial—Execution.*—It is error to issue execution before motion for a new trial is determined.

Appeal from Linn Circuit Court.

George W. Easley, for Appellant.

I. The acceptance of a lease, with a stated rent reserved, for a definite time, and holding thereunder for many years, as in this case for nine years, creates a tenancy from year to year, and the tenant is entitled to notice to quit before he can be dispossessed. (Tayl. Land & Ten., § 60, 467, 468; Jackson vs. Miller, 7 Cow., 747; Bedford vs. McElherron, 2 Serg. & R., 49; Jackson vs. Bryan, 1 Johns., 322; Grant vs. White, 42 Mo., 285; Finney vs. St. Louis, 39 Mo., 177.)

And whether the landlord consented to the holding after the expiration of the written lease, is a question of fact to be submitted to the jury, who may infer consent from the acquiescence of the landlord. (Grant vs. White, *supra*, and authorities above cited.) Nor is this rule changed by the statute (2 Wagn. Stat., 880, § 14), because after the expiration of the lease, by a long continuance of the possession with the acquiescence of the landlord, a new contract—a tenancy from year to year—is created. (The case of Young vs. Smith, 28

Mo., 65 was a case where a sufficient time had not elapsed to raise presumption of a new title. See the authorities cited above.)

II. Nor do the matters set up in the answer in this case amount to a disclaimer of the tenancy so as to dispense with notice to quit.

A. W. Mullins, for Respondent.

I. After accepting the lease and taking possession, defendant could not controvert DeGraw's title. (Hodges vs. Shields, 18 B. Mon., 828; Parker vs. Raymond, 14 Mo., 535; Walker vs. Harper, 33 Mo., 592; Grant vs. White, 42 Mo., 285.)

II. Notice to quit was not necessary. The tenant claims to hold adversely to his landlord. (Ingraham vs. Baldwin, 9 N. Y., 45; Jackson vs. French, 3 Wend., 337, 339; Thorp vs. Kelly, 5 Davis, 431; Young vs. Smith, 28 Mo., 65; Grant vs. White, Mo., *supra;* Tyler Eject., 365; 3 Phil. Ev., 590.)

Adams, Judge, delivered the opinion of the court.

This was an action of ejectment. The defendant by his answer denied the plaintiff's right to the possession, and specifically set up the statute of limitations. To maintain the issues on his part, the plaintiff introduced as evidence, a lease of the land in dispute for one year to the defendant, from one Hamilton DeGraw, ending in 1861, and then by appropriate conveyances, traced title in himself from DeGraw. The suit was commenced in 1869. This was substantially all the evidence in regard to the plaintiff's title. The case was submitted to a jury. The defendant introduced no evidence to maintain his defense, but demurred to the plaintiff's evidence. The court overruled this demurrer and a verdict and judgment were rendered for the plaintiff. The defendant filed a motion for a new trial, which was continued under advisement till the next term, and in the meantime an execution was issued and the plaintiff was put in possession of the land. At the next term the motion for a new trial was overruled and defendant excepted. He also filed a motion to quash the execution, which was overruled.

The main point relied on here, was the action of the court in overruling the demurrer to plaintiff's evidence. It is insisted, that under the evidence, the plaintiff could not maintain his action without first giving the defendant notice to quit. When a tenant holds over, but disclaims the right of his landlord to the premises, he is not entitled to notice to quit. This was a lease for one year. It had a definite time to run; and in such case no notice to quit was necessary.

There is nothing in the case to show that the tenancy was recognized by either party after the end of the year.

The demurrer to the plaintiff's evidence was therefore properly overruled.

It was erroneous to issue an execution before the motion for a new trial had been disposed of. But as the case resulted in favor of the plaintiff, this error caused no injury to the defendant.

Judgment affirmed. The other judges concur.

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LUTHER C. CHALLISS, Plaintiff in Error, *vs.* OLIVER DAVIS, Defendant in Error.

1. *Injunction—Ferry privilege—Conflicting charters of Missouri & Kansas Legislature.*—In bill to enjoin defendant from ferrying the Missouri River between this State and Kansas, within a certain territory to which plaintiff claimed the exclusive franchise, solely by virtue of the Act passed by this State, Nov. 17th, 1855, demurrer held well taken. *Non Constat*, but that under an Act passed by the Legislature of Kansas, defendant had a similar privilege of ferrying from the opposite shore.

Error to Buchanan Circuit Court.

Ben F. Loan, and Vineyard & Young, for Plaintiff in Error.

A. H. Vories, for Defendant in Error.

SHERWOOD, Judge, delivered the opinion of the court.

This was a proceeding on the part of Challiss to enjoin

Davis from infringing upon the privileges and franchises granted to those under whom Challiss claimed by virtue of "An Act to incorporate a ferry in the county of Buchanan," Approved November 17th, 1855. Section 6, of that Act confers "upon the said Million, Burnes & Brothers, the exclusive right to establish a ferry within two miles of said town of Atchison, Kansas Territory, on the North or Missouri side of said river." And the first section grants to the parties therein named, their heirs or assigns, the right and authority for the space of twenty years from a given date, to keep a public ferry across the Missouri river opposite the town of Atchison, and to have a landing on the north side of said river, upon the land of George M. Million. The petition alleged a compliance with the terms and conditions of the Act of incorporation, and claimed, in consequence of such compliance, that the petitioner was entitled to and had the exclusive right to all the tolls, receipts, profits, &c., belonging to his ferry, for two miles above and two miles below said ferry.

The acts of infringement with which the defendant was charged were in substance; that he had placed a ferry boat at plaintiff's landing and within the space to which plaintiff had the exclusive right, and had been and still was doing the business of a ferryman, crossing and ferrying a great many persons, cords of wood, posts and lumber, etc., the ferriage of which at ordinary rates would annually amount to several thousand dollars; that the damages which were being done by the defendant, and which he threatened still to continue to do, would be irreparable unless he was restrained, &c. The petition concludes with a prayer that defendant may "be enjoined and prohibited from using a ferry boat for any and all purposes, within two miles of the plaintiff's ferry landing in Buchanan county, Missouri, opposite the town of Atchison, in the State of Kansas," and for further relief. The defendant successfully demurred to this petition, alleging, among other grounds, that the same did not state any cause for granting the relief prayed for, and that the defendant never car-

ried any person or thing from the Missouri side of the river, the carrying of which would amount to an infringement of the rights of the plaintiff. Judgment was given on this demurrer and the plaintiff brings his cause here on writ of error.

There is no doubt that the Legislature of this State, could grant exclusive rights and franchises of the character claimed in plaintiff's petition, but it is also equally clear that this Act of incorporation could have no extra-territorial force or validity. The petition makes no showing whatever that the defendant had invaded or threatened to invade any of the privileges or franchises granted to those through whom the plaintiff claimed, under and by virtue of the Act of incorporation referred to. Had the defendant attempted the infraction of any of the privileges granted to those from whom the plaintiff claims as assignee, no hesitation would be felt in asserting that upon such a case, when properly presented, the applicant for relief would be entitled thereto. But no such case is presented here for our consideration. Admitting all the statements of the petition to be true, still it does not appear that any, even the slightest invasion of the privileges granted by this State to the plaintiff has occurred. From all that the petition states to the contrary, the defendant may have been the owner of franchises and privileges of like character and equally as valuable and exclusive as those mentioned in the petition, granted to him by Legislative authority in the State of Kansas, on the *opposite shore*. But at any rate it is not pretended that plaintiff had acquired an exclusive right on the Kansas shore, and consequently the way was open for the defendant to transport by means of his ferry boat, passengers and freight of any description, *from that shore to this*, whenever he deemed proper to do so.

The demurrer was well taken, and the adjudicated cases conclusively show this. (See Conway vs. Taylors' Ex'r, 1 Black, [S. C.] 603, and cases cited; Weld vs. Chapman, 2 Iowa, 524; Sto. Confl. Laws, § 20.)

Judgment affirmed. Judge Vories not sitting; the other judges concur.

Rufus K. Allen, Respondent, *vs.* Stephen Sales, and Frederick W. Smith, Appellants.

1. *Practice, civil—Correction of entries, nunc pro tunc.*—Courts have a right at a term subsequent to the one at which a judgment is rendered to correct, by an order *nunc pro tunc*, a clerical error or omission in the original entry, and it will be presumed in the absence of contrary evidence that the court exercised proper judgment in making such corrections.
2. *Judgment—Clerical omission in—Corrected at subsequent term, how—Interlineations.*—Where a clerk is ordered by the court at a subsequent term to supply a clerical omission in the record of a judgment by an entry *nunc pro tunc*, the proper course would be to enter anew in the proceedings of that term the entire judgment as corrected; and the action of the clerk in supplying the omitted part of the judgment, by an interlineation in the record of the preceding term, would be loose, irregular and reprehensible. But *semble*, that such improprieties of the clerk would not render the judgment a nullity.
3. *Sheriff's deed—Different judgments—One deed under—Consolidation of descriptions.*—A sheriff upon the sale of a certain parcel of land, against the owner of which three judgments and executions were outstanding, made a deed which united in one description the different judgments and executions, and the gross amount recovered. But the dates of the judgments and executions were correctly stated, and the names of all the parties were correctly given in the aggregate. The deed was substantially correct, and the recitals although somewhat ambiguous could mislead no one. *Held*, that the deed sufficiently conformed to the statute.
4. *Mechanic's lien—Lease-hold estate—Delivery of lease—What facts estop denial of.*—Where the owner of land stated to a house-builder that he had leased certain premises to a third party, and the builder thereafter erected a hotel on said ground, with the knowledge of the owner and without objection on his part; but on the contrary it appeared that the owner furnished said lessee with money to aid in erecting the hotel, and the lease was manifestly given with a view to such improvement; these facts, whether the lease was delivered or not, would estop the lessor from denying the delivery. And *semble*, that the fact that the owner some months after the commencement of the building, and when the lessee's responsibility became questionable, took from him a written surrender of the lease, would also estop him from asserting its non-delivery.
5. *Estoppel—Not the basis of title—May be used in rebuttal by plaintiff, when.*—*Semble*, that an estoppel *in pais* can never form the basis of a title on which ejectment will lie. But *held*, that in ejectment founded on a sheriff's deed which conveyed a certain lease-hold estate as that of defendant in the execution, where the owner of the land sets up as a defense the non-delivery of the lease, such defense may be rebutted by proof of acts on the part of the owner constituting estoppel *in pais*. In such case the claim of estoppel is used defensively and not as the creation of a title.

6. *Mechanics' liens—Judgment on—Proceedings anterior to, cannot be inquired into collaterally.*—A judgment in a mechanic's lien suit raises the presumption, which cannot be collaterally refuted, that the suit was commenced within ninety days after the filing of the lien; and that the lien was filed in time; and such judgment can be attacked in a collateral proceeding only by showing a want of jurisdiction in the court where the judgment was rendered.

7. *Mechanic's lien—Judgment relates back—Stat., Constr. of.*—Under the statute (Wagn. Stat., 907, § 7,) when a mechanic's lien is consummated by a judgment, that judgment relates back to the commencement of the building, and an intermediate transfer or surrender of the title cannot destroy or affect the lien of the holder.

Appeal from Buchanan Common Pleas.

Loan & VanWaters, for Appellants.

I. The interlineations were not part of the June Term judgments and were void. Hence the special executions directing sale of the leasehold were also void.

II. There was no proof of the filing of the liens or commencement of the suits which resulted in the judgment.

III. The sheriff's deed should have been excluded. It recited three judgments and three executions, when it was shown that no such judgments or executions ever issued.

IV. Estoppel *in pais* will not support ejectment.

V. Long prior to the judgments Cowan had surrendered his lease to Smith. (Fitzgerald vs. Hayward, 50 Mo., 516.) The judgments, if valid, were liens only from their date.

Hill & Carter, for Respondent.

I. The execution sale to Smith could not be attacked collaterally in this suit. (Durham vs. Heaton, 28 Ill., 264; Winston vs. Affalter, 49 Mo., 263; Wales vs. Bogne, 31 Ill., 464; Bonsal vs. Isett, 14 Iowa, 309; Draper vs. Bryson, 17 Mo., 71; Hendrickson's Admr. vs. St. L. & I. M. R. R., 34 Mo., 188; Lawrence vs. Speed, 2 Bibb., 401; Webber vs. Cox, 6 Monr., 110; Landes vs. Perkins, 12 Mo., 260–1.)

II. The sheriff's deed contains all necessary statutory recitals to pass title, and is evidence of the facts recited. (Wagn. Stat., 612, § 54; McCormick vs. Fitzmorris, 39 Mo., 24; Bank, etc. vs. Harrison, 39 Mo., 433; Samuels vs. Shelton, 48 Mo., 444.)

III. The judgments were valid till set aside in a direct proceeding. (Swiggart vs. Harber, 4 Scam. Ill., 364.)

IV. Smith did not pretend to buy back the lease till after the liens had attached and the building was fully completed.

V. The judgments dated back to the date of commencing the improvements (Wagn. Stat., 109, § 7), and would hold the unexpired leasehold. (Wagn. Stat., 908-9, § 4; Page vs. Hill, 11 Mo., 149; DuBois, Admr. vs. Wilson, 21 Mo., 213.)

VI. Smith admitted the execution of the lease, and that he told Allen before the latter commenced building, that he had leased the lot to Cowan. He interposed no objection to the work going on, hence he is estopped from denying Cowan's tenancy. (See Lindell vs. McLaughlin, 30 Mo., 28; Newman vs. Hook, 27 Mo., 207; Dezell vs. O'Dell, 3 Hill., 219; Taylor vs. Zepp, 14 Mo., 482; Blair vs. Smith, 16 Mo., 273; Chouteau vs. Goddin, 39 Mo., 250; Bunce vs. Beck, 43 Mo., 266; 46 Mo., 327; Rutherford vs. Tracy, 48 Mo., 325.)

Napton, Judge, delivered the opinion of the court.

This was an action of ejectment to recover a leasehold property in the City of St. Joseph. The plaintiff's title was derived from certain judgments, executions, and a sheriff's deed. There were three judgments all rendered at the June term 1871, one in favor of James M. Bedbury, and George Zettner vs. Samuel F. Cowan, for $1271.32; one in favor of Rufus K. Allen vs. Cowan, for $3110.54; and a third in favor of Francis M. Scott vs. Cowan, $185. These judgments were all to the effect, that they were to be levied of the goods and chattles, lands and tenements of said defendants, and if no sufficient property could be found to satisfy them, to be levied on the property of said defendant charged with the lien of the plaintiff, and described as follows: "A three story frame house containing about thirty rooms, known as the Missouri Valley House, and used as a hotel, and situated and erected on lot No. 8, block No. 8, in Smith's addition to the City of St. Joseph, County of Buchanan, State of Missouri, and also the unexpired leasehold term of said defendant,

in and to said lot and real estate," and a special execution was ordered.

These judgments were objected to by defendants on the ground, that on the face of the entries the words, "and also the unexpired leasehold term of said defendant in and to said lot and real estate," were interlined in the record; and it appeared further upon the examination of a witness, that the record of these judgments at the June term, did not have these interlineations, and that they were subsequently made by an employee of the clerk, at the request of a lawyer, who said the judge or court had so ordered.

It appears from the testimony of the clerk that this change in the judgment of the June term 1871, was made by order of the court, and on the motion of the plaintiff. It seems that subsequently to the June term, execution then had been issued on the judgments as they then stood on the record, and had been levied and returns made by the sheriff; but the plaintiff at the August term succeeding, moved to quash these executions and to correct the judgments, so that they should embrace the unexpired lease of defendant on the lot on which the building had been erected, in accordance with the 4th section of the mechanic's lien law. This motion was sustained, the first executions were quashed, and the record of the judgment so amended as to make the judgments embrace the unexpired term of the lease. The amendment was made by interlineation and by a clerk employed in the office to make up the books, and it was made at the August term.

The executions read in evidence by the plaintiff were regular, and need not be recited.

Objections were made to the sheriff's deed. The part objected to reads thus: "Whereas on the 7th day of June, 1871, three judgments were rendered and entered in the Circuit Court within and for the county of Buchanan and State of Missouri, and in favor of Francis M. Scott, Rufus K. Allen, James M. Bedbury and John Zettner, and against Samuel F. Cowan, for forty-five hundred and ninety-six dollars, and eighty-six cents, for their demand, and also

for the further sum of six dollars and ninety cents, which to the said Francis M. Scott, Rufus K. Allen, James M. Bedbury and John Zettner, was adjudged for their costs and charges in that behalf expended, as appeared of record in said Circuit Court; and whereas afterwards, to-wit; on the 14th day of Sept., 1871, three special executions, were issued from the office of the clerk of said court, in favor of the said Francis M. Scott, Rufus K. Allen, James M. Bedbury and John Zettner, and against the said Samuel F. Cowan, upon the said judgments, dated the 7th day of June, 1871, directed to the said sheriff of the county of Buchanan, and to me the said sheriff delivered; by virtue of which said writs or special executions, I as sheriff, as aforesaid, was directed and commanded to sell all the right, title, interest, claim, estate and property, of the said Samuel F. Cowan, of, in and to the following described real estate, situated and being in said county, to-wit, and charged with the liens of the said Francis M. Scott, Rufus K. Allen, James Bedbury and John Zettner, a three story hotel building, erected on lot 8, in block 8, in Smith's addition to the City of St. Joseph, known as the Missouri Valley House, and also the unexpired leasehold term of the said Samuel F. Cowan, of in and to said lot on which said building is situated, and whereas, &c." It appears from the evidence of the clerk, to which no objections were made, that the liens in these cases were filed Jany. 9th, 1871; and the petitions on them Jany. 12th, 1871.

The plaintiff claimed title under the judgments, executions and sheriff's deed above stated.

The ejectment suit was originally against Sales, but Smith the owner of the lot, was at his instance made a defendant. The defendant Smith had executed a lease to Cowan, for 10 years from May 1st, 1870; whether this lease was ever delivered to Cowan, is a disputed question of facts, concerning which there was evidence on both sides.

However this may be, it seems admitted, that about this time in April or May, 1870, Allen the plaintiff, who was a house-builder, made a contract with Cowan, for the erection

of this hotel building, and proceeded in connection with other contractors to furnish the materials and put up the building during the summer and fall of that year. The suits of Allen vs. Cowan, Scott vs. Cowan, Bedbury & Zettner vs. Cowan, were based on the liens thus acquired, and were commenced in January, 1871. Anterior to these suits, on the 27th of Sept. 1870, prior to the completion of the building, Cowan, by a writing indorsed on his lease from Smith, surrendered said lease and all his rights under it to Smith, in consideration of $2,300, which was the principal and interest of the money Smith had advanced to or procured for Cowan when the lease was executed, in order to enable Cowan to procure the erection of the hotel. There was evidence concerning a lease from Cowan to Sales, (the defendant) and of Sales attorning subsequently to Smith after the surrender of Cowan's lease from Smith, but the questions of law presented by the case, and which alone we propose to consider, do not require any detailed statement of this and a variety of other oral testimony.

The court instructed the jury: 1st. If the jury believe from the evidence that the lease from F. W. Smith to Sam. F. Cowan, for lot 8, in block 8, in Smith's addition to the City of St. Joseph, was duly delivered to said Cowan, or that said Smith told plaintiff that he had leased said lot to Cowan for a term of 10 years, and that plaintiff, relying on such statement, thereafter, under contract with said Cowan, erected the Missouri Valley House on said lot with the knowledge of Smith, and without objection on the part of said Smith, and that defendant Sales went into possession of said premises as the tenant of said Cowan; that the said lease by the defendant Smith to the said Cowan, for ten years, together with the judgments, executions, reports of sale and sheriff's deed of said property, read in evidence, *prima facie* entitle plaintiff to a judgment in this action against the defendants for the possession of said lot, and the building thereon for the unexpired term of said lease.

2nd. If the defendant Smith told plaintiff, that he had

leased lot 8, in block 8, in Smith's addition to the City of St. Joseph, to Samuel F. Cowan for 10 years, and the plaintiff, relying on such statement, thereafter, under contract with said Cowan, erected the Missouri Valley House on said lot, with the knowledge of said Smith and without objection on his part, plaintiff is not bound by any stipulations between said Smith and Cowan in relation to said lease, not contained in the written lease itself, unless such stipulations were brought to the knowledge of plaintiff before he built said house.

3rd. If the jury find for the plaintiff, they will further find the monthly value of the rents from the date of the sheriff's deed read in evidence, and will find against defendant Smith, the amount of rents which they believe from the evidence he has received from the defendant Sales, and which accrued after the date of said deed; and they will find against defendant Sales, the balance of the accruing rents from the date of said deed, to the present time.

Ten instructions were asked by the defendant, and all of them refused. It is unnecessary to repeat them because they merely reiterate in another form the points raised in the course of the trial in regard to the judgments, sheriff's deed, interlineations of the judgments, and also object to the regularity of the proceedings in the cases on which judgments were rendered, under which plaintiff bought; and deny that there was any evidence of the date of the liens or the date of the petitions on them. There was a verdict and judgment for plaintiff, and the case is brought here by appeal.

The first question in this case relates to the validity of the plaintiff's title acquired under the judgments obtained against Cowan, in June, 1870, and the executions on them and sheriff's deed to plaintiff. The two principal objections to the title are, that the judgments as interlined, and upon which the executions under which plaintiff bought were issued, were nullities, and that the sheriff's deed upon the sales under these executions, was invalid to convey any title.

That a court has a right, at a term subsequent to one at

which a judgment is rendered, to correct by an order *nunc pro tunc*, a clerical error or omission in the original entry, is indisputable. The error, whether of commission or omission, must appear from the record of the proceedings in which the entry of judgment is made. The record of the proceedings in the cases of Allen vs. Cowan and Scott vs. Cowan, &c., was not in evidence, the plaintiffs having merely proved the date of the liens and the date of the filing of the petitions, and the defendants not having offered any evidence in regard to them. Upon what property the petitions in these cases asked for an enforcement of the liens filed, we have no means of knowing. Every presumption is in favor of the action of the court that ordered the amendment, and we must suppose there was on the record whatever might be necessary to justify such amendment.

A proper mode of complying with this order of the court at the August term to supply the omission in the judgment rendered at the June term, was undoubtedly to enter anew in the proceedings of the August term, the entire judgment as corrected—and it was a loose, irregular and reprehensible act of the clerk in supplying the omitted part of the judgment by an interlineation in the record of the June term. But we are not prepared to hold that such improprieties on the part of the clerk will render the judgments nullities, and if it sufficiently appears that there was a *nunc pro tunc* order requiring the correction to be made, to reverse the judgment on such a ground, would be merely to put the parties to the expense and delay of procuring a second order which of course could be made now as well as at the time it was made.

But the main objection to this title, and a more serious one than that which we have just examined, is the singular blunder in the sheriff's deed, describing the judgments and executions. The sheriff seems to have consolidated the three judgments and the three executions into one, and the amount of damages and costs in the three cases. The dates of the judgments and the executions are correctly given, and the sums of money, both in regard to damages and costs are cor-

rectly stated, and the names of all of the parties, both plaintiffs and defendants in each of the three judgments are correctly given in the aggregate. These judgments and executions are all in evidence, and by an examination of them, it is easy to see that the deed of the sheriff is substantially correct in its recitals, and could mislead no one. There is undoubtedly some ambiguity in these recitals, occasioned by the officer undertaking to abbreviate the deed, and attempting to embrace three judgments and three executions in one general description, and failing to express this intention in appropriate terms, and adopting a manner that does not distinctly show who was plaintiff in each particular case. There is no doubt the deed could now be corrected if necessary, but as we think it was a substantial compliance with the statute, we are not disposed to put the parties to this expense.

Conceding the title of plaintiff to be *prima facia* good and co-extensive with the property conveyed by the sheriff's deed, it remains to inquire how far this affected the lot and house admitted to be owned in fee by the defendant Smith, and temporarily leased by Smith's lessee to the defendant, Sales. The delivery of the lease from Smith to Cowan—the defendant in these executions—is denied, and there is evidence on both sides in regard to this. We have not detailed the evidence, because it was undoubtedly proved, and the verdict of the jury under the instructions of the court so finds, that Smith told the plaintiff, upon inquiry, in April, 1870, that he had leased the lot to Cowan for ten years; and it clearly appears that Smith, who was the owner of the lot, was living in the city when the hotel was in process of building by plaintiff, and never made any objection. On the contrary, Smith advanced $2,000 to Cowan to aid him in the erection of this building, and the lease was doubtless with a view to such improvement on the lot. These facts, whether the lease was delivered or not, constituted a clear case of estoppel *in pais*. Indeed, the fact that Smith, some months after the commencement of the building and when Cowan's responsibility became questionable, took from him a written surrender of the lease, would

seem also to estop Smith from asserting its non-delivery. If never delivered, its formal surrender in writing would appear to have been unnecessary.

But it is urged that an estoppel *in pais*, though very good as a matter of defense, could never form the basis of a title on which an ejectment would lie. This may be conceded. The title on which this suit in ejectment was based, consisted of the judgment, sale under execution and the sheriff's deed. This deed conveyed, or professed to convey, the unexpired term of this lease. The defense is, that the lease was never made or consummated.

To rebut this defense, an estoppel *in pais* is offered. The estoppel is used defensively, not as a creation of title, and we think the first instruction given for the plaintiff was therefore correct.

As to the facts recited in the instruction, and appearing in the evidence, constituting an estoppel, it is hardly necessary to recite cases to show that the instruction was right in assuming that such facts would constitute an estoppel. It is about as strong a case of estoppel as could be well conceived. The plaintiff builds a costly edifice on a lot which, before the building was commenced he is informed by the owner, had been leased for ten years to the person with whom the plaintiff thereupon contracts, and the owner stands by and sees the building going up and never says a word to the contrary. In point of fact, the plaintiff was not misinformed, as such a lease was undoubtedly executed and acknowledged, and, it is to be inferred, was consummated by delivery, since otherwise its subsequent surrender would have been unnecessary. But whether it was or not, the plaintiff was led to believe it was, by the owner of the lot, and upon the faith of such representations expended large amounts of money in the erection of a building, under the immediate eye of the owner, who waited to take back a surrender of the lease, until the building was nearly or quite finished. Under such circumstances, the owner would not be allowed to say, that his statements to the builder were false. If false, he cannot be allowed,

after money has been expended on the faith of their truth, to assert their falsehood.

The instructions asked by the defendant in the case are to the effect, that it devolved on the plaintiff to show that the proceedings in the cases of enforcing the liens were regular and conformed to the statute relating to such liens; that the suits must have been commenced within ninety days after the liens were filed; that there was no evidence on the part of plaintiff as to the time when the suits were commenced—that the time of filing the liens was notproved—that there was no proof that they were filed in six months after the indebtedness accrued. It is sufficient to say in regard to these instructions, that the judgment offered in evidence raised the presumption, which collaterally could not be refuted, that the proceedings were in conformity to law, and which could only be attacked by showing a want of jurisdiction in the court where the judgment was rendered.

It was said that defendant, Sales, was not served with notice—but the record as to this point was not offered in evidence—and it appeared that Smith was made defendant on his own motion.

The only remaining point raised by the instruction asked by defendant not heretofore noticed, is, that before the date of the judgments forming the basis of plaintiff's title, the lease to Cowan was surrendered, and therefore, the judgment would not reach further than the building erected on the lot. But the 7th Sec. of the 3rd Art. of the law concerning Liens (Wagn. Stat., 909), provides that: "the lien for work and materials as aforesaid, shall be preferred to all other incumbrances which may be attached to or upon such buildings, bridges or other improvements on the ground, or either of them, subsequent to the commencement of such buildings or improvements." In other words, when the lien is consummated by a judgment, that judgment relates back to the commencement of the building, and an intermediate transfer or surrender of the title could not destroy or affect the lien of the builder.

The judgment is affirmed. The other judges concur.

FRANCIS M. DAVIS Appellant, *vs.* ARCHIBALD THOMPSON Respondent.

1. *Ejectment—Statute of Limitations—Possession for period of—Patent need not be proved, when.*—Possession of land in the owner or his grantors for more than thirty years accompanied with a claim of right, establishes a title which will warrant a recovery in ejectment, unless defeated by a better title set up by defendant. It is unnecessary in such case to go further and show title from the United States, where the Government is no party to the suit.

Appeal from Livingston Circuit Court.

Dixon, McFerran & Warder, for Appellant.

The law presumes that a person in possession of land has acquired the title which the people or sovereign once held. (Tyl. Ej., 105, 569; 14 How., 295.)

Ray and Ray, for Respondent.

In actions of ejectment, the statute of limitations does not begin to run so as to confer title till the "fee" has passed from the General Government, by patent or grant. (Gibson vs. Chouteau, 50 Mo., 85; *Ibid*, 13 Wall., 93; *Ibid*, 39 Mo., 536; Cabanne vs. Lindell, 12 Mo., 184.)

The statute cannot bar the United States General Government.

WAGNER, Judge, delivered the opinion of the court.

The plaintiff brought his action in ejectment in the Circuit Court, to recover the possession of a tract of land lying in Livingston County. The petition was in the ordinary form, and the answer contained a simple denial of its allegations. The trial was before the court without the intervention of a jury, and the plaintiff introduced evidence showing that one A. C. Martin conveyed the premises in question to the plaintiff in the year 1860, by a deed, and that said Martin had occupied and possessed the real estate under a claim of title, derived by deed, for about ten years before the sale and conveyance to plaintiff; and that one Wm. Martin who granted and sold the land to A. C. Martin, the plaintiff's grantor, had been in possession of the land at the time he made said sale and con-

veyance for more than twenty years, thus showing a continuous possession under a claim of title in the plaintiff's grantors of more than thirty years. Upon this evidence, the defendants by way of demurrer to the testimony, moved the court to declare the law to be, that the plaintiff had shown no right to the possession of the premises in controversy, because it did not appear that the title to the same had ever passed out of the United States; and that in the absence of such proof, the title was presumed to remain in the government. This motion, against the objection of the plaintiff, was sustained; whereupon, the plaintiff took a non-suit, and after an ineffectual effort to set the same aside, has brought the case here by appeal.

The only question in this case is, whether after the plaintiff had shown a good title by possession, it was necessary before he could recover, to go further and show that a patent had emanated from the government to his grantor or those under whom he claimed. It does not appear how the defendant obtained possession of the premises, or that he has any meritorious claim to them. He did not set out any title in his defense, nor did he give any evidence. The general doctrine is, that possession for the period of the statute of limitations, accompanied by a claim of title, will constitute such a title as to enable the party to maintain ejectment. In Crockett vs. Morrison, (11 Mo., 1) this court said: "As the action for ejectment is a possessory action, where no title appears on either side, a prior possession though short of twenty years, will prevail over a subsequent possession which has not ripened into a title, provided the prior possession be under a claim of right and not voluntarily abandoned." So in Dale vs. Faivre, (43 Mo., 556), it was declared that it was well settled, that prior possession, accompanied by a claim of the fee, raises a presumption of title, and is sufficient to support the right to eject him who has only the naked possession, and that the grantee of the person so holding prior possession, succeeds to his rights.

Kent, Ch. J., in Smith vs. Lorrillard (10 Johns., 355,) very

clearly states the reasons on which the doctrine is based, "that the first possession" he says "should in such cases be the better evidence of right, seems to be the just and necessary inference of law. The ejectment is a possessory action, and possession is always presumption of right, and it stands good till other and stronger evidence destroys that presumption. This presumption of right, every possession of land has in the first instance, and after a continued possession of twenty years, under pretense or claim of right, the actual possession ripens into a right of possession which will toll an entry."

The very case in reference to the necessity of the plaintiffs showing a title from the government, was decided in Christy vs. Scott, (14 How., 283, 295.) It was there held, that although the plaintiff's title might not have been good as against the government, still the defendant could not defend against it without showing title in himself, and that when plaintiff in his petition averred, that he was actually seized, and the defendant who was a mere intruder, ejected him, it was an unlawful act; and that ejectment was maintainable notwithstanding the government might have the true title, or might have granted it to another.

When the plaintiff, as in this case, showed a possession in his grantors extending back more than thirty years, accompanied with a claim of right, it made out in him a title which warranted a recovery, unless defeated by a better title set up by the defendant. And from the lapse of time during which the land had been occupied and possessed, it might well be presumed as against everybody except the government, that a patent had actually issued.

But the government is not here defending or making any claim to the land, and the defendant will not be permitted to interpose a defense in its behalf.

The judgment must be reversed and the cause remanded. All the judges concur.

ARMSTRONG BEATTIE, Respondent, *vs.* ANDREW COUNTY, Appellant.

1. *County railroad bonds—Andrew county—Interest on bonds, what lawful.*—In January, 1860, by the general law then in force, the county had power to issue bonds, for the Platte County Railroad Company, bearing interest at the rate of ten per cent. These bonds were not governed by § 33 of the statute touching Railroads (R. C. 1855, p. 429), limiting the interest to seven per cent. That section referred to special cases contemplated by § 31 of same act. The bonds of Andrew county were issued under different circumstances and a distinct and independent grant of power; and as no limitation was therein imposed as to the interest, it was competent to fix any rate of interest not prohibited by law

Appeal from Andrew Circuit Court.

Heren & Ray, for Appellant.

I. Andrew county, at date of the bonds, was restricted by express statute to seven per cent. interest on bonds. (R. C. 1855, p. 429, § 33.) In the absence of charter or special law prescribing rate of interest, said county was governed by that section.

The court of Andrew county was a mere agent for the county, and bound to follow strictly the power conferred by law. (Flagg vs. Palmyra, 33 Mo., 440; St. Louis vs. Gorman, 29 Mo., 593.)

Hall, White & Oliver, for Respondent.

I. The Andrew County Court had the right to issue the bond and coupon sued on, under and by virtue of § 13, of the charter of the Platte County Railroad Company. (R. R. Laws Mo., 54.)

II. The revised statutes of Missouri, of 1855, which were in force when the bond and coupons sued upon were issued, authorized bonds for railroad subscriptions to bear ten per cent. interest. (R. C. 1855, p. 427, §§ 30, 31.)

III. Section 33 has no application to this case. (North Missouri R. R. Co. vs. Gott, 25 Mo., 540.)

WAGNER, Judge, delivered the opinion of the court.

This was an action brought by the plaintiff to recover the amount of a bond, and two coupons, issued by the defendant. The bond was issued in January, 1860, due and payable ten years after date, bearing interest at the rate of ten per cent. per annum, and was made on account of a subscription by the defendant, to the Platte County Railroad Company. In the Circuit Court there was a judgment for the plaintiff, and the defendant has appealed the cause.

The only question necessary to be considered in the case is, whether the defendant had the legal power to make the bonds bear ten per cent. interest. The 13th section of the charter of the company, under which the authority is derived for subscribing to the stock, declares that it shall be lawful for the County Court of any county, in which any part of the route of the railroad may be, to subscribe to the stock of the company, and that it may invest its funds in the stock of the company, and issue the bonds of the county to raise funds to pay the stock thus subscribed. In this section, the power is clearly given to make the subscription and issue the bonds; but no rate of interest is prescribed.

The general law of the State permits parties to pay ten per cent. interest on bonds, notes or written obligations, and this would prevail and govern the contract unless it is shown that there is some other restriction placed upon the power. But it is now insisted on behalf of the defendant, that the general railroad law in existence when this bond was issued, prohibited the courts from making the bonds bear a greater rate of interest than seven per cent., and that, that law applied to this case.

Section 30 of the general Railroad law, (1 R. C. 1855, p. 427,) gave the County Courts power to subscribe to the capital stock of railroad companies; and by section 31, it is provided that in order to raise funds to pay the instalments which may be called for from time to time by the board of directors of such railroad, it shall be the duty of the County Court making such subscription, to issue their bonds, or levy

a special tax upon all property and taxables made taxable by law for State and County purposes, and upon the actual capital that all merchants and grocers may have invested in business in the county, to pay such instalments to be kept apart from other funds, and to be appropriated to no other purpose, than the payment of such subscriptions. There is then a further provision made, restricting the total amount of tax levied for railroad purposes in any one year, in any county to a sum not exceeding thirty per centum of the subscription made.

Section 33 is as follows: "Any county subscribing for railroad stock which shall have internal improvement funds or overflowed or swamp lands granted to it by the State, may apply such funds, or mortgage or sell such overflowed or swamp lands, to pay such subscription or any part thereof, and provide for the remainder, if any, by the tax as aforesaid; and any county or city subscribing as aforesaid, may (if so required by the railroad company to raise funds to pay the instalments, in anticipation of the collection and payment of its railroad tax) issue the bonds of such city or county of denominations not exceeding one thousand dollars, and bearing interest at a rate not exceeding seven per cent. per annum.

This last section limiting the rate of interest, has direct reference to the 31st section, which prescribes the manner of raising funds from time to time, by taxation to pay the instalments as they may be called for by the board of directors of the railroad company. If the money is not promptly collected, or is not collected in time, then the county may, if the company requires it, issue the bonds not bearing more than seven per cent. interest in anticipation of the collection and payment of the tax. These bonds are issued in special cases to meet an exigency which does not occur, and has no application to the present cause. The limitation is on bonds of the description designated in the general law, and on those bonds only. The bond in this suit was issued in a different manner and under a distinct and independent grant of power; and as no limitation was imposed as to interest, it was compe-

tent for the parties to contract for any rate which the law did not prohibit.

For which reason it follows that the judgment below mus be affirmed. The other judges concur.

ALLEN B. LANGSHORE, Respondent, *vs.* HENRY C. KELSO, *et al.*, Appellants.

1. Judgment affirmed. See Ross vs. Murphy, *ante*, p. 372.

Appeal from Caldwell Circuit Court.

James McFerran for Appellants.

Low & Dilley, for Respondent.

SHERWOOD, Judge, delivered the opinion of the court,

The same point is involved in this case as in that of Ross vs. Murphy, decided at the present term.

Judgment reversed, and cause remanded. Judge Vories dissents. The other judges concur.

END OF FEBRUARY TERM, 1874, AT ST. JOSEPH.